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FACEBOOK, INC.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

FACEBOOK, INC.,

Plaintiff,

v.

POWER VENTURES, INC. a Cayman Island
Corporation; STEVE VACHANI, an
individual; DOE 1, d/b/a POWER.COM,
DOES 2-25, inclusive,

Defendants.

Case No. 5:08-cv-05780 JW

**FACEBOOK INC.'S NOTICE OF
MOTION AND MOTION TO
COMPEL THE PRODUCTION OF
DOCUMENTS AND DISCOVERY
RESPONSES FROM DEFENDANT
POWER VENTURES, INC.**

Date: October 24, 2011
Time: 9:00 A.M.
Judge: Hon. James Ware
Courtroom: 15, 18th Floor

[REDACTED]

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

	Page
I. INTRODUCTION	1
II. BACKGROUND	2
A. Facebook’s Allegations Against Power, and Power’s Admissions Concerning Its Wrongful Conduct	2
B. Power’s Failure To Produce Relevant Documents	4
C. Power’s Failure To Adequately Respond To Facebook’s Interrogatories	7
D. Production of Relevant Power Documents by Third Parties	11
III. ANALYSIS	13
A. Power Should Be Ordered To Produce Documents Responsive To Facebook’s Document Requests	13
1. The Requested Discovery Is Relevant to Facebook’s Claims	13
B. Power Should Be Compelled To Supplement Its Interrogatory Responses	14
C. Good Cause Exists To Compel The Production Of The Requested Documents And Responses To The Interrogatories	17
IV. CONCLUSION	17

TABLE OF AUTHORITIES**Page(s)****CASES**

<i>Adams v. Murakami</i> , 54 Cal. 3d 105 (1991)	14
<i>Davis v. Fendler</i> , 650 F.2d 1154 (9th Cir. 1981).....	14
<i>Eureka Fin. Corp. v. Hartford Accident and Indem. Co.</i> , 136 F.R.D. 179 (E.D. Cal. 1991)	14
<i>General Dynamics, Corp. v. Selb Mfg. Co.</i> , 481 F.2d 1204 (8th Cir. 1973).....	15
<i>In re Sulphuric Acid Antitrust Litigation</i> , 231 F.R.D. 320 (N.D. Ill. 2005)	16

STATUTES

California Penal Code Section 502	2, 16
CAN-SPAM Act (15 U.S.C. § 7701, <i>et seq.</i>).....	1, 2
California Penal Code 502	2
Computer Fraud and Abuse Act (18 U.S.C. § 1030)	2

OTHER AUTHORITIES

Civil Rule 37-1	11
Fed. R. Civ. P. 26(b)(5).....	14
Fed. R. Civ. P. 33	14
Fed. R. Civ. P. 33(d)	passim
Fed. R. Civ. P. 33(d)(1).....	15
Federal Rule of Civil Procedure 26(b)(1)	13

1 TO POWER VENTURES, INC. AND ITS ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on October 24, 2011 at 9:00 A.M. or as soon thereafter as
3 the matter may be heard in the above entitled Court located at 450 Golden Gate Avenue,
4 San Francisco, California 94102, Plaintiff Facebook, Inc., will and hereby does move pursuant to
5 Fed. R. Civ. P. 26(b)(1) and 37(a) and Civ. L.R. 37-2 for an order compelling defendant Power
6 Ventures, Inc. to produce documents in response to Facebook's First and Second Sets of Requests
7 for Production of Documents, and to respond to Facebook's First Set of Interrogatories.

8 Pursuant to Local Rule 37-1, Facebook hereby certifies that the parties have made a
9 reasonable effort to meet and confer regarding these discovery disputes. Despite the parties' good
10 faith efforts, they were unable to resolve their differences.

11 Facebook's motion is made on the grounds that the information responsive to Facebook's
12 requests for production and interrogatories is relevant to Facebook's claims in this litigation, is
13 not unreasonably cumulative or duplicative, cannot be obtained from any source other than
14 Power, and any burden or expense on Power does not outweigh the discovery's likely benefit to
15 Facebook. This Motion is based on this notice, the accompanying memorandum of points and
16 authorities, the accompanying Declaration of Monte Cooper ("Cooper Decl."), the pleadings and
17 papers on file in this action, and such other evidence and argument as may be presented at the
18 hearing on the Motion.

CERTIFICATION PURSUANT TO

FED. R. CIV.P. 37(a)(1) and CIV. L.R. 37-1(a)

Counsel for Facebook hereby certifies pursuant to Fed. R. Civ. P. 37(a)(1) and Civ. L.R. 37-1(a) that it has satisfied its meet and confer obligations with counsel for defendants concerning their inadequate search, collection and production of documents responsive to Facebook's First and Second Sets of Requests for Production, and their inadequate responses to Facebook's First Set of Interrogatories. Despite Facebook's efforts to resolve defendants' deficiencies, however, defendants persist in refusing to perform a thorough search and produce all responsive documents and things, or to provide complete Interrogatory responses.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This is the third motion to compel that Facebook has had to bring in this case, which involves allegations that Defendants Power Ventures, Inc. and Steve Vachani violated the CAN-SPAM Act, the Computer Fraud and Abuse Act, and California Penal Code 502. Facebook once again seeks an order compelling Power to produce highly relevant documents that are being withheld without justification, and to respond properly to interrogatories that are aimed at gaining information about the key liability issues in this case.

Specifically, having already successfully moved to compel highly relevant source code that Power withheld without cause for months,¹ and having further recently moved to compel Power to make an adequate search of its emails and other records for responsive information,² Facebook now is forced to seek an Order compelling Power to produce missing documents, and to provide complete responses to interrogatories that seek information concerning (a) Power's unauthorized access of the Facebook website in order to obtain and download Facebook user data; (b) Power's circumvention of technical blocks implemented by Facebook, such as Facebook's blocks of Power's IP addresses; and (c) Power's profits and advertising revenue generated in conjunction with its unauthorized access of Facebook's website.

Power, without cause, refuses to provide the highly relevant information and documents sought by these requests. Yet, the discovery is neither unduly burdensome nor expensive for Power to obtain, and is directly relevant to the issues raised in the case—including the issues raised in Power's currently pending motion for summary judgment.³ Moreover, highly relevant Power documents recently produced by third parties prove that Power has not made a good faith effort to locate relevant information from its own resources. Power should be ordered to produce the requested documents, and answer (or supplement) its interrogatory responses.

¹ See Dkt. No. 127 (Order dated August 18, 2011)

² See Dkt. No. 129 (Motion to Compel currently set for hearing on October 24, 2011).

³ Dkt. No. 98 (Motion for Summary Judgment currently scheduled for hearing on October 31, 2011).

1 **II. BACKGROUND**

2 **A. Facebook's Allegations Against Power, and Power's Admissions Concerning**
 3 **Its Wrongful Conduct.**

4 Facebook operates one of the most popular social networking websites on the Internet that
 5 connects people with their friends, family and coworkers. Dkt. No. 9 at ¶ 1. As of December
 6 2008, Facebook had more than 132 million active users worldwide. *Id.*

7 On December 30, 2008, Facebook filed suit against Defendants Power Ventures, Inc. and
 8 Steve Vachani asserting, among other claims, violations of the CAN-SPAM Act (15 U.S.C.
 9 § 7701, *et seq.*); the Computer Fraud and Abuse Act (18 U.S.C. § 1030); and California Penal
 10 Code Section 502. These claims stem from Power's December 2008 campaign to use its website
 11 www.power.com to access the Facebook website in violation of Facebook's Terms of Use, to
 12 then crawl, scrape and download Facebook user information for display on Power's own website,
 13 www.power.com, and to then send commercial messages to Facebook users soliciting them to
 14 join Power. *See generally* Dkt. No. 9 at ¶¶ 20-31, 45-86. Power has admitted many of the facts
 15 underlying this dispute, and as a result the Court already has ruled that it is "undisputed" that
 16 "Facebook suffered some damage or loss as a result of Power's actions." *See* Dkt. No. 89, at 6-7.

17 For instance, the parties in their pleadings agree that Power employs its own browser,
 18 which aggregates information from multiple social network websites, to permit its users "to enter
 19 their account information to access the Facebook site through Power.com." Dkt. No. 54 at ¶ 18;
 20 *see also id.* at ¶¶ 45, 50. [REDACTED]

21 [REDACTED]
 22 [REDACTED] Cooper Decl. Ex. 1(Vachani Tr.), at 222:13-19; 240:2-11. *Id.* Ex. 2 ("[i]n
 23 some instances, users can read and respond to a message received at one of [the social
 24 networking] sites without actually visiting the site."). Power is able to divert Facebook user
 25 traffic to Power's website and generate revenue in this way because, as Power concedes, it has
 26 "developed computer software and other automated devices and programs to access and obtain
 27 information" from the Facebook website for aggregating services. Dkt. No. 54 at ¶ 74. This
 28 means of "accessing" and "obtaining information" is commonly known as "scraping," a well-

1 recognized form of cyber-attack on the Internet involving the trespass to a computer server.

2 Power further has admitted that it copied and stored all the Facebook data files necessary
3 to display the Facebook website through the Power browser. *Id.* ¶ 75. Power even concedes that
4 it “provided users with tools necessary to access Facebook through Power.com.” *Id.* ¶ 64. Power
5 also concedes that “[a]t no time have Defendants received permission from Facebook to represent
6 that solicitation of Facebook username and passwords was authorized or endorsed by Facebook.”
7 *Id.* ¶ 53.

8 Further, it is undisputed that on December 1, 2008, Facebook notified Power’s CEO
9 Defendant Steve Vachani that “Power.com’s access of Facebook’s website and servers was
10 unauthorized and violated Facebook’s rights, including Facebook’s trademark, copyrights, and
11 business expectations with its users.” Dkt. No. 9 at ¶ 57; Dkt. No. 54 at ¶ 57. Vachani
12 immediately wrote an email to Power’s technical team that [REDACTED]
13 [REDACTED] Cooper Decl. Ex. 3 (Dec. 1, 2008 email from Steve Vachani to
14 Eric Santos). Meanwhile, though, Power also expressed its agreement to abide by Facebook’s
15 Terms and “integrate Power.com with Facebook Connect,” a set of Application Programming
16 Interfaces (“APIs”) from Facebook that enable Facebook members to log onto third-party
17 websites, applications, mobile devices and gaming systems with their Facebook identity. Dkt No.
18 54 at ¶ 58. However, it is undisputed that after Facebook notified Power that its access of the
19 Facebook website was not permitted by Facebook, Power continued to allow its users to use
20 Power’s website to access the Facebook website rather than switching to Facebook Connect.
21 Cooper Decl. Ex. 4 (Power’s Responses to Facebook’s Request for Admission), Admission Nos.
22 12-13. Power also continued to store Facebook user login information, and continued to take,
23 copy and make use of Facebook’s user data without Facebook’s permission. *Id.* Admission Nos.
24 15, 18, 21-22, 37, 51. In fact, despite promising to delete friend information and switch to
25 Facebook Connect, Power to date has never deleted any of the user login information or data it
26 scraped and downloaded from the Facebook website. *Id.* Admission Nos. 52, 54-56.

27 It likewise is undisputed that “Facebook implemented technical measures to block users
28 from accessing Facebook through Power.com.” Dkt. No. 54 at ¶ 63. *See also* Cooper Decl. Ex.

1 D Admission No 24. Yet, despite these blocking efforts, Power admits that it subsequently
 2 “provided [its] users with tools necessary to access Facebook through Power.com.” Dkt. No. 54
 3 at ¶ 64. Indeed, Vachani has fully admitted that [REDACTED]
 4 [REDACTED]
 5 [REDACTED] See Cooper Decl. Ex. 1 at 107:4-12; 327:9-16. Vachani
 6 further has conceded that when Facebook attempted to block Power from unauthorized access,
 7 [REDACTED]
 8 [REDACTED] *Id.* at 327:9-328:16. However, notwithstanding these other admissions, in a
 9 Declaration from Vachani in support of their pending Motion for Summary Judgment, defendants
 10 now contend that Facebook’s block was ineffective because it only blocked one “outdated IP
 11 address Power had used, and did not block others that Power was using in the normal course of
 12 business.” Dkt. No. 98-2, ¶ 11. Power does not identify what “outdated” IP address it is referring
 13 to, or what were the others that it claims it was using instead. *Id.*

14 **B. Power’s Failure To Produce Relevant Documents.**

15 Facebook has sought, through written discovery, to obtain relevant information related to
 16 the admitted events, including seeking documents establishing how Power employed proxy
 17 servers to circumvent Facebook’s block, what harm Power caused Facebook through its unlawful
 18 actions in accessing, scraping and downloading information from the Facebook website, and what
 19 revenue Power obtained as a result of its actions, including diverting users from Facebook to
 20 Power, where they would view Power’s advertisers rather than Facebook’s. To that end,
 21 Facebook served Power with its First Set of Requests for Production (Nos. 1-50) on October 22,
 22 2010. Cooper Decl., Ex. 5. On June 3, 2011, Facebook served Power with its Second Set of
 23 Requests for Production (Nos. 51-89). Cooper Decl., Ex. 6.

24 Among Facebook’s requests it asked that Power produce, *inter alia*, the documents and
 25 things related to Power’s activities related to its efforts to circumvent Facebook’s block of
 26 Power’s IP addresses and its use of proxy servers. Significantly, Power concedes that the [REDACTED]
 27 [REDACTED]

28 Cooper Decl. Ex. 1, at 107:4-12; 330:1-331:14. The relevant requests seeking this and related

documentation read as follows:

REQUEST FOR PRODUCTION NO. 8:

ALL COMMUNICATIONS AND DOCUMENTS concerning or that RELATE TO the use of ANY server, including proxy server, to access the FACEBOOK WEBSITE.

REQUEST FOR PRODUCTION NO. 21:

ALL DOCUMENTS that RELATE TO YOUR knowledge of technical measures to block OR in ANY way inhibit YOU OR POWER USERS from accessing the FACEBOOK WEBSITE, including, but not limited to, ANY blocks to YOUR IP address.

REQUEST FOR PRODUCTION NO. 22:

ALL DOCUMENTS that RELATE TO YOUR access to the FACEBOOK WEBSITE following FACEBOOK's implementation of ANY technical measures to block such access, including, but not limited to, ANY blocks to YOUR IP address, including how such access was achieved.

REQUEST FOR PRODUCTION NO. 23:

ALL DOCUMENTS that RELATE TO YOUR providing POWER USERS with the means to access the FACEBOOK WEBSITE following FACEBOOK's implementation of ANY technical measures to block such access, including, but not limited to, blocks of YOUR IP address(es), including how such access was achieved.

REQUEST FOR PRODUCTION NO. 24:

ALL DOCUMENTS that RELATE TO YOUR access to the FACEBOOK WEBSITE subsequent to your knowledge OR awareness that YOU did not have FACEBOOK's permission to access the FACEBOOK WEBSITE.

REQUEST FOR PRODUCTION NO. 25:

ALL DOCUMENTS that RELATE TO YOUR providing POWER USERS with the means to access the FACEBOOK WEBSITE subsequent to your knowledge OR awareness that YOU did not have FACEBOOK's permission to access the FACEBOOK WEBSITE.

REQUEST FOR PRODUCTION NO. 26:

ALL DOCUMENTS that RELATE TO the occurrences between January 1, 2007 AND the present date, where YOU accessed the FACEBOOK WEBSITE to send, OR to encourage POWER USERS to send messages to FACEBOOK USERS.

REQUEST FOR PRODUCTION NO. 27:

ALL COMMUNICATIONS AND DOCUMENTS concerning OR that RELATE TO ANY IP addresses used by YOU.

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REQUEST FOR PRODUCTION NO. 28:

ALL COMMUNICATIONS AND DOCUMENTS concerning OR that RELATE TO ANY AND all IP addresses from which YOU accessed or provided POWER USERS the means for accessing the FACEBOOK WEBSITE.

REQUEST FOR PRODUCTION NO. 36:

ALL DOCUMENTS reflecting, associated with, OR that RELATE TO ANY of YOUR responses to FACEBOOK's concurrently-served First Set of Interrogatories to Defendant Power Ventures, Inc.

REQUEST FOR PRODUCTION NO. 65:

ALL DOCUMENTS that summarize, describe, refer to, OR relate to Steve Vachani's statement that POWER "need[ed] to be prepared for Facebook to try to 'block'" Power.com, as written in Steve Vachani's December 1, 2008 email to Felipe Herrera and Eric Santos, produced at POWER 2011.02.03 000089-90.

REQUEST FOR PRODUCTION NO. 66:

ALL DOCUMENTS that summarize, describe, refer to, OR relate to the statement in Steve Vachani's May 6, 2011 Declaration that "Facebook's IP blocking attack was partial, incomplete, and ineffective."

Id. at Exs. 5 & 6. Power responded to all of these Requests by promising to "conduct a reasonable search for documents responsive to this request." *Id.* Ex. 7 & 8.

Facebook also served requests that sought the documentation concerning the amount of revenue Power generated, including revenue generated as a result of its use of advertisements that its users would view by accessing Facebook through the Power website. Those requests read as follows.

REQUEST FOR PRODUCTION NO. 40:

DOCUMENTS sufficient to show POWER's monthly AND annual revenue.

REQUEST FOR PRODUCTION NO. 41:

DOCUMENTS sufficient to show POWER's monthly AND annual income.

REQUEST FOR PRODUCTION NO. 56:

ALL DOCUMENTS AND COMMUNICATIONS that summarize, describe, refer to, relate to, OR constitute ANY contract(s) or agreement(s) between POWER and third-party advertisers.

Id. Exs. 5 & 6. In response to Facebook's Request Nos. 40, 41 and 56, Power wrote that it will

1 not produce documents. Specifically, Power objects that Request Nos. 40 and 41 are “not
 2 relevant” and “not calculated to lead to the discovery of admissible evidence.” *Id.* Ex. 7. With
 3 respect to Request No. 56, Power objects that this Request is “vague, ambiguous, overbroad and
 4 unduly burdensome, not relevant to the subject matter of this action and not calculated to lead to
 5 the discovery of admissible evidence,” and “calls for documents protected from disclosure by the
 6 attorney-client privilege and work product doctrine.” *Id.* Ex. 8.

7 On February 3, 2011, Power produced a total of 13 documents in response to Facebook’s
 8 First Set of Requests for Production.⁴ Of these 13 documents, three are duplicates and, two of the
 9 others are a PowerScript Training document and a “PowerScript Documentation Developer
 10 Manual,” which only describe “high level” features of Power’s PowerScript software. *See* Dkt.
 11 No. 124-11, at ¶¶ 17-23.⁵ None of the 13 documents in any way relates to proxy addresses, IP
 12 addresses used by Power, or advertising and other revenue generated by Power. In fact, Power
 13 apparently produced no documents whatsoever in response to Requests Nos. 8, 21-28, 36, 40-41,
 14 56 or 66.

15 After lengthy motion practice which resulted in it being compelled to do so, Power on
 16 August 23, 2011 for the first time made its source code available for inspection. However, as of
 17 September 6, 2011, Facebook still has not received hard copies of the code, and Power has not
 18 identified how (if at all) the code is responsive to any of the requests subject to this motion. *Id.*
 19 Ex. 9 (9/6/11 email from M. Metanat to T. Fisher).

20 **C. Power’s Failure To Adequately Respond To Facebook’s Interrogatories.**

21 On October 22, 2010, Facebook also served Power with its First Set of Interrogatories. *Id.*
 22 Ex. 10. These Interrogatories, like the Requests for Production, address a variety of subjects
 23 relevant to Facebook’s claims against Power, including the process by which Power accessed (or
 24 allowed others to access) the Facebook website, Power’s efforts to integrate power.com with
 25 Facebook, and Power’s maintenance and/or use of the information and data obtained from the

26 ⁴ Power has yet to produce documents in response to Facebook’s Second Set of Requests for
 27 Production, or to supplement its previous production. Cooper Decl. ¶ 7. It served its objections
 on July 5, 2011.

28 ⁵ Dkt. No. 124-11 is the redacted copy of a Declaration of Larry Melling. The un-redacted copy
 was filed under seal. *See* Dkt. No.127.

Facebook website. On December 15, 2010, Power responded to Facebook's Interrogatories, but with incomplete information. *Id.* Ex. 11. Specifically, Interrogatories Numbers 1-3, 7, 13-15, and 19, and Power's responses to those Interrogatories, read as follows:

INTERROGATORY NO. 1:

Describe in detail AND IDENTIFY the process by which POWER accesses OR accessed the FACEBOOK WEBSITE.

RESPONSE TO INTERROGATORY NO. 1:

Power objects that this interrogatory is vague and ambiguous, overly broad, unduly burdensome, and seeks information that is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving these objections, pursuant to Fed. R. Civ. P. 33(d), Power refers to its business records including its June 2007 PowerScript Training document, and its PowerScript Documentation Developer Manual. These business records contain highly confidential, proprietary trade secrets, and will be produced upon entry of an appropriate protective order.

INTERROGATORY NO. 2:

Describe in detail AND IDENTIFY the process by which POWER provides OR provided POWER USERS with access to the FACEBOOK WEBSITE.

RESPONSE TO INTERROGATORY NO. 2:

See response to Interrogatory No. 1.

INTERROGATORY NO. 3:

Describe in detail AND IDENTIFY ANY AND ALL software, i.e., computer code, programs, tools, scripts OR automated devices, YOU use OR used to access OR provide POWER USERS with the means to access, the FACEBOOK WEBSITE to copy, download, extract, OR retrieve information from the FACEBOOK WEBSITE, including, but not limited to, the processes OR procedures by which that software was developed, including how it was tested and on what code its functionality was tested.

RESPONSE TO INTERROGATORY NO. 3:

See response to Interrogatory No. 1.

INTERROGATORY NO. 7:

Describe in detail and IDENTIFY the process by which YOU continued to access, OR provide POWER USERS' with the means to access, the FACEBOOK WEBSITE following FACEBOOK's IP blocking, including, but not limited to the POWER employee(s) OR director(s) responsible for that process OR decision.

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RESPONSE TO INTERROGATORY NO. 7:

Power objects that this interrogatory is vague and ambiguous, overly broad, unduly burdensome, and seeks information that is not within Power's possession, custody or control. Subject to and without waiving those objections, Power had implemented an industry standard practice to refresh, randomize, and rotate IP addresses. Power's IP addresses were regularly updated for all Power users on all social networks. These processes for updating IPs are commonplace industry standard practices which Power had implemented prior to the dispute with Facebook. Power did not change its process for providing users with access to their Facebook accounts in response to any attempted "IP blocking" by Facebook. The person responsible for Power's conduct in this regard was its CEO, Steven Vachani.

INTERROGATORY NO. 13:

Explain in detail what actions, if any, YOU took to integrate the POWER WEBSITE with FACEBOOK Connect.

RESPONSE TO INTERROGATORY NO. 13:

Pursuant to Fed. R. Civ. P. 33(d), Power refers to its business records including its email correspondence concerning these issues, which will be produced upon entry of an appropriate protective order. Power's team worked relentlessly and diligently to integrate Facebook Connect and explicitly communicated these efforts to Facebook. In December 2008 and January 2009, it was Power's highest priority to innovate and launch Facebook connect through Power.com.

INTERROGATORY NO. 14:

Describe in detail YOUR "detailed product plan" regarding the "reintegration of Facebook with Facebook connect," referenced in YOUR December 17, 2008 e-mail to FACEBOOK's legal counsel. Dkt. No. 56 at Ex. A.

RESPONSE TO INTERROGATORY NO. 14:

Pursuant to Fed. R. Civ. P. 33(d), Power refers to its business records including its email correspondence concerning these issues, which will be produced upon entry of an appropriate protective order.

INTERROGATORY NO. 15:

IDENTIFY ALL facts in support of YOUR contention that POWER had "concerns" regarding the integration of the POWER WEBSITE with FACEBOOK Connect on the schedule requested by FACEBOOK, as asserted in POWER's Answer and Counterclaim to FACEBOOK. Dkt. No. 41 at ¶ 60.

RESPONSE TO INTERROGATORY NO. 15:

Pursuant to Fed. R. Civ. P. 33(d), Power refers to its business records including its email correspondence concerning these issues, which will be produced upon entry of an appropriate protective order.

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INTERROGATORY NO. 19:

IDENTIFY AND describe in detail how YOU saved, maintained, OR stored FACEBOOK user login information OR DATA obtained from the FACEBOOK WEBSITE OR servers, including the systems on which such DATA OR information is OR was stored, the location of such systems, the security protocols on those systems, whether such DATA remains on those systems, AND the dates and reasons why YOU have deleted OR purged this DATA OR information from YOUR storage systems.

RESPONSE TO INTERROGATORY NO. 19:

Power objects that this interrogatory is vague and ambiguous, overly broad, unduly burdensome, and seeks information that is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence, and seeks information that is not within Power's possession, custody or control. Subject to and without waiving these objections, Power states that prior to accessing or storing any user's data, Power first obtains full permission from each user to access their personal data. Power respects and honors the trust that Power users have placed in Power to securely access and store their data [sic]. Power responsibly and securely stores its users' data, and Power has never had a security breach. Unless a user requests that his or her data be deleted, Power does not delete users' data. Power has a responsibility to preserve and store this data for the user, and Power respects and honors that responsibility. Power does not delete data that users have expect [sic] us to store and to maintain for them, just as Yahoo, Gmail and Facebook, for example, do not delete data that their users expect them to store and maintain.

See Id. Exs. 10 & 11. As is self-evident, Power provided insufficient, and/or partial responses to the propounded Interrogatories. *Id.*

To the extent that Power directs Facebook to "refer to its business records" pursuant to Fed. R. Civ. P. 33(d) in its responses to Interrogatories Nos. 1-3, which cover how Power accessed Facebook and downloaded data from the site, Power's meager 13 documents do not include any responsive information. By way of example, the PowerScript Training document, and Power's PowerScript Documentation Developer Manual cited in each of Power's responses to Interrogatories Nos. 1-3, include no references or details whatsoever to the process by which Power actually accessed the Facebook website. *See* Dkt. No. 124-11, at ¶¶ 17-23. Nor has Power subsequently supplemented the responses to identify where, if at all, its belatedly produced source code includes the routines that are responsive to these Interrogatories, particularly those requested in interrogatory No. 3.

Likewise, Power improperly relies upon Rule 33(d) and the 10 emails it produced to respond to Interrogatories Nos. 13-15 concerning various actions related to integration of Power with Facebook Connect. Yet, the generically cited emails do not include any details about how

1 Power integrated Facebook Connect, what was its “detailed product plan” it claimed to have
2 developed, or its concerns about the use of that feature. *See* Cooper Decl. Exs. 3, 12-20.

3 Similarly, Power’s response to Interrogatory No. 7, which inquires about the methods by
4 which Power circumvented Facebook’s block, evasively answers that “Power had implemented
5 an industry standard practice to refresh, randomize, and rotate IP addresses,” and also that
6 “Power’s IP addresses were regularly updated for all Power users on all social networks.” Yet,
7 Power makes no effort to explain what was the “industry standard practice” it refers to, what IP
8 addresses it is referencing, or how the IP addresses supposedly were updated, even though that is
9 precisely the information requested by the Interrogatory. Power’s response to Interrogatory No.
10 19, which asks for the technical details of how and where Power stored Facebook data and user
11 information, also does not provide the information requested. Instead, Power’s response to
12 Interrogatory No. 19 offers a self-serving characterization of how Power ensured security.

13 On their face, each of Power’s responses to these Interrogatories is evasive, incomplete,
14 and non-responsive.

15 **D. Production of Relevant Power Documents by Third Parties**

16 It now also is evident that Power did not search its documents for responsive materials or
17 information. On May 12, 2011 and May 17, 2011, as part of the meet-and-confer process
18 required by Local Civil Rule 37-1, Facebook sent Power two letters enumerating the deficiencies
19 with Power’s Interrogatory Responses and Power’s production of documents, respectively. *See*
20 Cooper Decl., Ex. 21 & 22. In response, Power did little, if anything, to supplement its responses.
21 With regard to its production, Power simply responded that it had “identified and produced all
22 responsive documents that were located after a diligent search, with the exception of raw
23 computer source code [and that] [n]o documents other than raw source code were withheld.” *Id.*
24 Ex. 23.

25 However, recent productions by third parties in response to subpoenas prove that Power
26 did not, in fact, conduct a diligent search, and that it has access to responsive documents and
27 information which it is withholding. For instance, on September 2, 2011 Ed Niehaus, Power’s
28 former Director of Marketing and Global Communications, produced 631 pages of documents in

1 response to a Facebook subpoena that included, *inter alia*: (1) Power's internal business plan [REDACTED]
2 [REDACTED]
3 (Niehaus 0056-64); (2) internal notes from discussions in November 2008 about Power's planned
4 launch, [REDACTED]
5 [REDACTED] (Niehaus 0078-81); (3) previously unproduced and
6 supposedly non-existent emails from Vachani from November 2008 discussing the launch of
7 power.com's service, [REDACTED]
8 [REDACTED] (Niehaus 0089-93); (4) an evaluation of Facebook's legal claims against Power,
9 [REDACTED] (Niehaus 0229-30); (5)
10 functional demonstrations of Power's integration of Facebook user data and of features scraped
11 from the Facebook website (Niehaus 0545-557); and (6) PowerPoint presentations describing
12 Power's various features, [REDACTED] (Niehaus 0610-631). Cooper
13 Decl. Exs. 24-29. Likewise, Leigh Power, the individual who leased the domain
14 www.power.com to Power, on August 29, 2011 produced 1047 pages of previously unproduced
15 documents that included, among many other relevant documents, his own emails from 2008
16 discussing with Power's former Corporate and Legal Director Felipe Herrera the launch of the
17 Power website, and its financing. *Id.* Exs. 30, 31 (8/29/08 & 9/25/08 emails).

18 Notably, Power has taken the position in its other papers that it searched for all of these
19 documents in Vachani's emails using keywords like "Facebook," and that they simply do not
20 exist – ostensibly because Facebook supposedly was a minor issue to Power. *See* Dkt No. 136, at
21 3-9. The fact that some of the recently produced emails discussing Power's launch are from
22 Vachani himself, and include the word "Facebook" within the content of the emails, proves the
23 falsity of Power's assertion that it conducted a diligent search. *See Id.* Ex. 26 (Niehaus 0089-93).
24 The volume of documents produced by the third parties, which dwarfs Power's own production,
25 further undermines Power's arguments.

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1 **III. ANALYSIS**

2 **A. Power Should Be Ordered To Produce Documents Responsive To Facebook's**
 3 **Document Requests.**

4 **1. The Requested Discovery Is Relevant to Facebook's Claims**

5 The Court should compel Power to perform a diligent search for documents responsive to
 6 Request for Production Nos. 8, 21-28, 36, 40-41, 56, and 65-66, and to produce them. The recent
 7 independent production by third parties of large volumes of heretofore unproduced Power
 8 documents responsive to Facebook's requests proves that Power has not conducted a diligent
 9 search for highly relevant documents. This is simply untenable.

10 Federal Rule of Civil Procedure 26(b)(1) provides that "[p]arties may obtain discovery
 11 regarding any nonprivileged matter that is relevant to any party's claim or defense . . . [and] [f]or
 12 good cause, the court may order discovery of any matter relevant to the subject matter involved in
 13 the action." Fed. R. Civ. P. 26(b)(1). Information related to Power's access of Facebook's
 14 website, and use of IP addresses and proxy servers (Request Nos. 8, 21, 22, 23, 24, 25, 26, 27, 28,
 15 36, 65, & 66) clearly satisfies the Rule 26(b) standard. That documentation is critical to
 16 determining how and by what means Power gained unauthorized access to the Facebook website,
 17 and how Power later circumvented Facebook's technical measures implemented to block Power's
 18 access. [REDACTED] Cooper Decl.

19 Ex. 1, at 107:4-12; 330:1-331:14. Indeed, [REDACTED]
 20 [REDACTED]
 21 [REDACTED] *Id.* at

22 327:9-328:16. Yet, Power has produced no documentation what so ever in response to any of
 23 these requests. The fact that third parties have produced documents discussing Facebook's
 24 functionality and showing how Power incorporated such functionality reflects that Power
 25 possesses, and should be able to produce, its own documents responsive to the requests.

26 Facebook's request for Power's agreements with third party advertisers also is relevant to
 27 Facebook's claims and also should be produced. *See* Cooper Decl. Ex. 6, Request No. 56.
 28 Facebook displays its own advertisements on a Facebook user's home page (the default page

1 when a user signs into their Facebook account) as well as a user's profile page. However, Power

2 [REDACTED]
3 [REDACTED] *Id.* Ex. 1

4 at 222:13-19; 240:2-11. Instead, Power benefits [REDACTED]

5 [REDACTED] *Id.* Power's agreements with third-party advertisers thus are highly relevant,
6 because they help establish damages for one kind of harm to Facebook – namely, Power's unjust
7 enrichment as a result of Power's unauthorized access to Facebook's website and services.

8 Power's advertising agreements thus should be produced.⁶

9 Request Nos. 40 and 41 seek documents related Power's financial data, and again easily
10 satisfy the Rule 26(b) relevance standard. Facebook is entitled to present evidence of Power's
11 financial condition at trial for purposes of an assessment of damages, including punitive damages.
12 *See Adams v. Murakami*, 54 Cal. 3d 105, 119 (1991). For instance, the court "cannot make a
13 fully informed determination of whether an award of punitive damages is excessive unless the
14 record contains evidence of the defendant's financial condition." *Id.* at 110. (*citing* BAJI No.
15 14.71 (7th ed. 1986 bound vol.) p. 205). The withheld documents should be produced for that
16 reason alone. Moreover, the revenue figures reflected in the withheld documents may have been
17 derived from advertisers whose advertisements were shown by Power to its users in lieu of
18 Facebook's own advertisements. Thus, the documentation, like that with Request No. 56, is
19 potentially relevant to establishing damages from Power's unjust enrichment. Information
20 concerning Power's revenues and financial condition should be produced.

21 **B. Power Should Be Compelled To Supplement Its Interrogatory Responses.**

22 Power's responses to Interrogatories Nos. 1-3, 7, 13-15, and 19 are obviously deficient,
23 and must be supplemented pursuant to Fed. R. Civ. P. 33. The information sought goes to the
24

25 ⁶To the extent that Power claims that documents responsive to Facebook's Request for Production
26 No. 56 are privileged, Power waived such claims by asserting a non-specific privilege objection.
27 *See Eureka Fin. Corp. v. Hartford Accident and Indem. Co.*, 136 F.R.D. 179, 183 (E.D. Cal.
28 1991) ("several courts hold that a non-specific objection is improper and by itself serves as a
waiver of the privilege asserted"); *Davis v. Fendler*, 650 F.2d 1154, 1160 (9th Cir.
1981)(explaining that a blanket privilege objection is improper). Moreover, Power has failed to
produce a privilege log, as required by Fed. R. Civ. P. 26(b)(5).

1 heart of Facebook's claims, such as how Power gained unlawful access to the Facebook website,
 2 how Power used and stored the information it obtained from Facebook, how Power was able to
 3 circumvent Facebook's block of Power's IP address, and how Power later attempted to abide by
 4 Facebook's demands to integrate its own website with that of Facebook using Facebook Connect.
 5 The Interrogatories thus all request highly relevant information. Yet, while Power has a duty to
 6 conduct a good faith investigation of the sources reasonably available to it, it has not done so.
 7 *See General Dynamics, Corp. v. Selb Mfg. Co.*, 481 F.2d 1204, 1210 (8th Cir. 1973). Instead,
 8 Power's answers are intentionally evasive, vague, and incomplete.

9 For instance, to the extent that Power responds to Facebook's Interrogatory requests by
 10 generically referring to its document production pursuant to Rule 33(d), Power's responses are
 11 clearly unsatisfactory. *See* Cooper Decl., Ex. 11 (Response Nos. 1, 2, 3, 13, 14, 15). Power is
 12 required to "specify[] the records that must be reviewed, ***in sufficient detail to enable the***
 13 ***interrogating party to locate and identify them*** as readily as the responding party could." Fed. R.
 14 Civ. P. 33(d)(1) (emphasis added). Here, Power's cursory responses fail to provide Facebook
 15 with sufficient detail to enable it to locate and identify the information it seeks. For instance, in
 16 response to Interrogatories Nos. 1-3, which relate to how Power accessed the Facebook website,
 17 Power directs Facebook to two documents concerning its PowerScript software that do not even
 18 mention Facebook, let alone provide the requested information. *See* Dkt. No. 124, at ¶¶ 17-23.
 19 Nor has Power attempted to remedy this deficiency by identifying where in its source code the
 20 relevant information would exist, as is specifically requested by Interrogatory No. 3. On top of
 21 that problem, the recent production of Power's own documents by third parties, which include
 22 discussions of Power's features, underscore that the two PowerScript documents produced by
 23 Power are not themselves in any way exhaustive of relevant "business records."

24 Likewise, Power's responses to Interrogatory Nos. 13, 14, and 15 are facially deficient.
 25 Those Interrogatories relate to Power's purported attempts to integrate the Power website using
 26 Facebook Connect. As asserted in its Answer to Facebook's First Amended Complaint, Power
 27 contends that its conduct was lawful because it was "justified under the circumstances." *See* Dkt.
 28 No. 41, at ¶ 165. Facebook anticipates that Power will argue that its conduct was warranted due

1 to its purported efforts, and alleged inability, to use Facebook Connect to provide its services.
 2 This information, therefore, is necessary to defend against such assertions.

3 However, in responding to Interrogatory Nos. 13-15, Power again simply relies upon
 4 Rule 33(d), and “refers to business records including its email correspondence concerning these
 5 issues” Such a response offers none of the required “detailed specification of the records
 6 [that would] permit [Facebook] to find the document as readily as can [Power].” *In re Sulphuric*
 7 *Acid Antitrust Litigation*, 231 F.R.D. 320, 325-26 (N.D. Ill. 2005). The identified emails do not
 8 provide the information sought by the Interrogatories, and in fact offer no details at all. *See*
 9 Cooper Decl. Exs. 3, 12-20. Further, the recent unexplained production by third parties of emails
 10 from Power officials like Vachani discussing Facebook prove that Power has not even attempted
 11 to locate all documents or business records that would be properly cited via Rule 33(d), as it has
 12 elsewhere claimed it has done. *See* Dkt No. 136, at 3-9.

13 Similarly, Power’s deliberately vague and evasive response to Facebook’s Interrogatory
 14 No. 7 also is improper. Power vaguely indicates that “Power’s IP addresses were regularly
 15 updated for all Power users on all social networks,” and that “[t]hese processes for updating IPs
 16 are commonplace industry standard practice which Power had implemented prior to the dispute
 17 with Facebook.” At no point, however, does Power specify what these “commonplace industry
 18 standards” entail, or how it supposedly regularly updated its IP addresses. This information may
 19 be critical in showing that Power circumvented Facebook’s implemented technical blocks in
 20 violation of Facebook’s claims under the CFAA and California Penal Code Section 502. In
 21 effect, Power does not respond with the information the Interrogatory calls for. Moreover, Power
 22 [REDACTED], so it should be able to identify how that was
 23 accomplished. Cooper Decl. Ex. 1, at 107:4-12; 330:1-331:14.

24 Finally, Interrogatory No. 19 seeks information relating to the storage of data or
 25 information obtained from the Facebook website. This information is crucial to ascertaining
 26 Power’s document preservation efforts, the extent of Power’s use of information obtained from
 27 Facebook, and the volume of traffic by Power users when accessing Facebook. Power’s response
 28 to this Request may be of the utmost significance in light of the fact that Power claims it has

1 [REDACTED]
 2 [REDACTED] *Id.* Ex. 1 at 298:17-24; 271:21-272:5. Yet, Power's response to Interrogatory No.
 3 19 is largely non-responsive and irrelevant, and does not actually provide the information
 4 requested. Power fails to provide any information regarding the technical process implemented in
 5 saving, maintaining, or storing Facebook users' login information or data from Facebook's
 6 computer networks. Nor does Power provide information regarding the system for storing such
 7 information, including the location of such systems or any security protocols. Supplementation is
 8 required.

9
 10 C. **Good Cause Exists To Compel The Production Of The Requested Documents
 And Responses To The Interrogatories.**

11 Good cause exists to compel the production of the requested documents, because there is
 12 no other method by which Facebook may obtain the requested documents and information. It is
 13 undisputed that the information sought by Facebook's document requests and interrogatories is
 14 both relevant and necessary to Facebook's litigation of its claims against Power. Moreover,
 15 Power's Motion for Summary Judgment on Facebook's claims makes the need for these
 16 documents and information even more pressing. Facebook requires the requested discovery to
 17 conduct a complete analysis of its claims against Power and to provide support for its Opposition
 18 to Power's Motion for Summary Judgment currently pending before the Court. *See* Dkt. No. 98.

19 Power has failed to provide any satisfactory reason to justify withholding the materials
 20 and information requested by Facebook. Indeed, Power indicated that it would "conduct a
 21 reasonable search" for the requested production. Notably, Power has failed to provide any basis
 22 for withholding the requested discovery. Therefore, Power should be required to produce the
 23 requested documents and supplement its interrogatory responses.

24 **IV. CONCLUSION**

25 For the foregoing reasons, Facebook requests that the Court grant its Motion to Compel
 26 and order Power to produce documents in response to Requests for Production Nos. 8, 21, 22, 23,
 27 24, 25, 26, 27, 28, 36, 40, 41, 56, 65, & 66 and supplement its responses to Interrogatory Nos. 1,
 28 2, 3, 7, 13, 14, 15, and 19.

1 Dated: September 7, 2011

ORRICK, HERRINGTON & SUTCLIFFE LLP

2
3 /s/ Morvarid Metanat

4 MORVARID METANAT
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